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ABSTRACT

Collective bargaining relationships in school districts are affected by court actions in a variety of ways. Courts have acted as a "surrogate legislature" by providing legal structures where legislation is absent and by modifying legislation through the process of statutory construction. This paper examines the courts' role in structuring bargaining relationships. Three detailed case studies are presented. The first case, from Hazelwood, Missouri, demonstrates how judicial involvement can affect the existence of bargaining relationships in a school district and the development of such relationships. The second case reviews the impact of the 1968 "Holland rule," requiring careful judicial scrutiny of a strike before injunctive relief is granted, upon subsequent events in Michigan and elsewhere. The third case study examines the initial effects of a California Supreme Court case and shows how the courts can affect the role of public employment relations boards in labor-management relations disputes in public education. In a concluding section the authors note that the courts, using familiar judicial paradigms, regularly structure bargaining relationships. The authors also discuss some of the underlying limitations of judicial structuring of school labor-management relations. (Author/MLF)

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The structural underpinnings of school district collective bargaining have received intensive scholarly attention in recent years. Structures inherent in the logic of the bargaining process have been described along with sub-structures embedded in the strategies used by negotiators. Outside the bargaining context the conditions which induce teacher and school board militance have been studied. The significance of local political and socio-economic contexts has been examined. Statutory structuring of the bargaining relationship has been studied too (see Cresswell & Murphy, 1980; Mitchell et al., 1981).

Our goal in this paper is to explore the role of the courts in structuring bargaining relationships. It seems to us that the courts have received less attention than they deserve. Certainly the courts have received less attention than legislatures. Much of the empirical literature on collective bargaining in education conveys the impression that teacher-board bargaining began with Wisconsin's adoption of enabling legislation in 1959; subsequently the process spread to other states as a result of legislative enactments. However bargaining relationships, and collectively-bargained contracts, existed long before 1959 (Eaton, 1975). Even today nearly 40 percent of the states have no bargaining statutes, yet in many of these states, e.g.,

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Missouri, Illinois, Ohio, Kentucky, and Arizona, bargaining is well-established and is practiced in the context of judicially-approved legal structures. An early example of judicial structuring is found in Connecticut's 1951 Norwalk case (a declaratory judgment action). There the court ruled as follows:

> [The first question is] related to the right of the plaintiff to organize itself as a labor union and to demand recognition and collective bargaining. The right to organize is sometimes accorded by statute....The right to organize has also been forbidden by statute....In Connecticut the statutes are silent on the subject. Union organization in industry is now the rule rather than the exception. In the absence of prohibitory statute or regulation, no good reason appears why public employees should not organize as a labor union....It is the second part of the question...that causes difficulty. The question reads: "Is it permitted to the plaintiff under our laws to organize itself as a labor union for the purpose of demanding and receiving recognition and collective bargaining?" The question is phrased in a very peremptory form. The common method of enforcing recognition and collective bargaining is the strike....[T]he strike is not a permissible method of enforcing the plaintiffs' demands....There is no objection to the organization of the plaintiff as a labor union, but if its organization is for the purpose of "demanding" recognition and collective bargaining the demands must be kept within legal bounds....What we have said does not mean that the plaintiff has the right to organize for all of the purposes for which employees in private enterprise may unite...It means nothing more than that the plaintiff may organize and bargain collectively for the pay and working conditions which it may be [illegible] the power of the board of education to grant.
>
> [The next questions] in effect ask whether collective bargaining between the plaintiff and defendant is permissible...If the strike threat is absent and the defendant prefers to handle the matter through negotiation with the plaintiff, no reason exists why it should not do so. The claim of the defendant that this would be an illegal delegation of authority is without merit. The authority is and remains with the board. This statement is not to be construed as approval...to negotiate a contract which involves the surrender of the board's legal discretion, is contrary to law, or is otherwise ultra vires.... (Norwalk Teachers Association v. Board of Education of Norwalk, 83 A.2d 842, Sup. Ct. of Errors, Ct., 1951).

With these words the Connecticut court went further than many state statutes go today. For Connecticut teachers and school boards the Norwalk opinion provided the principal legal structure for collective bargaining relation-

ships until the legislature adopted a statute in 1965.

Even after statutes are adopted the courts create structures which are important to bargaining. For example in five states whose legislatures have authorized bargaining for teachers (California, Idaho, Montana, New Jersey, and Washington) the statutes are silent on the all-important question of teacher strikes; courts have partially filled the gap in these states through case law decisions arising from specific teacher-board disputes. Thus one of the courts' roles, we shall suggest, is that of "surrogate legislature." The courts provide legal structure where legislation is absent, and they modify legislation through the process of statutory construction.

The courts also play an important third-party role in local teacher-board dispute processing. In a survey of 1978-79 teacher strikes we found that approximately 40 percent of the struck school boards sought injunctive relief. Elsewhere we have reported on the proceedings and outcomes following board requests for relief (Colton, 1977a; Graber, 1980). Today we shall be concerned with another and unexpected outcome of board requests for injunctive relief: fully half of them resulted in court efforts to foster negotiated settlements of the teacher-board disputes. Often these efforts took the form of direct orders to the board of education itself to bargain; at other times the courts' role was more behind-the-scenes. Whatever the form, judicial structuring of local dispute processing was very apparent. Recent research has given some attention to the behaviors of other third parties--mediators, arbitrators, and fact-finders. Today we want to draw attention to the courts' heretofore neglected role in settlement efforts.

Our data have been gathered during the past few years in the context of a series of studies of injunction proceedings. An injunction is simply a court order directing some party to refrain from performing some action,

e.g., stop striking, stop picketing. Failure to comply can lead to contempt proceedings. In private sector labor-management relations injunctions once served as favorite tools of management, which discovered that injunctions were potent weapons for fighting unions and breaking strikes. Courts justified such orders as essential for the protection of "commerce" or "property." The use of labor injunctions in the private sector was curtailed half a century ago by the Norris-LaGuardia Act and similar legislation passed by many states. However these acts did not pertain to public employees. In the last two decades, when teacher strikes have become commonplace, 40-45 percent of struck school boards have sought injunctive relief.

We have been studying injunction actions for some time. We began with a study showing that injunction proceedings quickly become entwined with the play of power between teachers and school boards (Colton, 1977b). Later work surveyed the frequency with which injunctions were used (Colton, 1977a; Graber, 1980). We have made close analyses of the use of the "irreparable harm" standard in injunction proceedings (Colton & Graber, 1980; Colton & Graber, 1981). During the course of these studies it became increasingly apparent that injunction proceedings had structural effects which we had not anticipated. We are <u>not</u> referring to the obvious effects of an injunction, i.e., those that flow from a court's decision to enjoin (or not enjoin) a strike. Such decisions clearly do effect the immediate dispute, albeit in ways often less potent than school managers might wish. In this paper our concern is with other structural effects of court proceedings.

Incidents such as the following, gathered during the course of our N.I.E. study of teacher strikes, helped trigger our curiosity about the dimensions of judicial structuring of collective bargaining:

--Bremerton, Washington, 1978. At a hearing on a school board's request for injunctive relief from a teacher strike, the judge

denied the request, referred to "the Arabs and Israelies who keep going to war," and scolded the parties for being in court when they "could have better spent their time by negotiation." Negotiations resumed and a settlement was achieved without further court involvement. Here we have a case where a court preserved the bilateral structure of a bargaining situation.

--St. Louis, Missouri, 1979. After a strike had dragged on for several weeks the circuit court allowed a group of parents to seek injunctive relief. The action forced both the school board and the teachers into court, where the parents, teachers, board, and court all sought to bring the strike to an end (Lemke, 1981).

--Kansas City, Missouri, 1977. In an effort to end a bitter strike the court appointed a liaison officer; subsequently the court accepted the officer's recommendation that the Board of Education be ordered to reinstate the striking teachers whom it had dismissed, to re-employ them the following year, and to refrain from all punitive action vis-à-vis strike-related activities.

--Washington, D.C., 1979. During the course of injunction proceedings designed to end a teacher strike the court ordered the reinstatement of the expired teacher-board contract.

--New York State, 1978. Teacher strikes were promptly enjoined by the courts, without hearings. Yet in Michigan, which like New York has a no-strike law, courts were far less willing to grant prompt injunctive relief.

--Everett, Washington, 1978. Rather than issuing an injunction against the teachers, the judge issued an order requiring at

least ten hours of negotiations within the next two days, and further directed the federal mediator in the case to report privately to the court as to whether the bargaining was in good faith.

--Bridgeport, Connecticut, 1978. In the context of an injunction proceeding the presiding judge ordered negotiations, set a deadline for reaching agreement, imposed a gag order on both sides and on the mayor, and requested a fellow judge to intercede with the parties in settlement efforts.

--Jefferson Union District, California, 1978. A court declared that it had jurisdiction over a teacher strike case, and granted injunctive relief. Two years later in Modesto a court denied that it had jurisdiction over a teacher strike, and hence refused to grant an injunction. Less than two weeks later the same court, in the same strike, asserted jurisdiction and granted relief.

--Butler, Pennsylvania, 1978. Granting an injunction request a local judge, on his own motion, declared Pennsylvania's Public Employee Relations Act unconstitutional.

Such events may not surprise close observers of public sector labor relations. Yet a reading of the statute books provides no indications that the courts are authorized to engage in such activities. Faced with evidence of widespread judicial structuring of labor-management dispute resolution procedures in schools, without apparent legal authorization for such activity, we sought to develop fuller descriptions and analyses of the role of the courts.

In this paper we report on three instances of judicial structuring of labor-management relations in school districts. While three cases provide a

very limited foundation for argument, they should suffice to outline the main parameters of our contentions; obviously many more cases are required before the significance of the argument can be assessed. The first case, arising in Hazelwood, Missouri, demonstrates the way in which judicial involvement can affect the very existence of bargaining relationships in a school district, and how such involvement affects the development of such relationships. A second case, observed in a state where the Holland rule has been adopted, reveals the way in which courts can create a de facto right to strike even in the face of a statutory prohibition, effectively giving teachers powers which, in states such as Pennsylvania and Oregon and other limited-right-to-strike states, have been granted by legislatures. (The Holland rule requires careful judicial scrutiny of a strike before injunctive relief is granted.) Our third case, based on a strike in San Diego, shows how the courts can affect the role of Public Employment Relations Boards (PERBs) in labor-management relations disputes in public education. In a concluding section we discuss some of the underlying regularities and limitations of judicial structuring of school labor-management relations.

Hazelwood, Missouri

The Hazelwood School District sprawls across the northern portion of St. Louis County--an area dominated by scores of middle income housing subdivisions. School enrollment in 1978 was approximately 20,000. Most of the district's 1,100 teachers are affiliated with the National Education Association.

The legal environment of teacher-board negotiations in Hazelwood has been determined entirely by court action. Although the Missouri Constitution of 1945 gave employees the right to organize and to engage in collective bargaining, the Missouri Supreme Court held that the constitutional right did

not extend to public employees (City of Springfield v. Clouse, 206 SW2d. 539, Mo. Sup. Ct., 1947). In 1965 the legislature altered the situation somewhat by adopting a bill which permitted most public employees to form labor organizations and to "meet and confer" with employees. Strikes were expressly prohibited (Rev. Stat. Mo. 105.500-.503). However teachers were specifically excluded from coverage under the 1965 statute. Subsequent efforts to adopt a statute for teachers have foundered.

The absence of legislation has not stopped Missouri teachers' efforts to act collectively. De facto bargaining arrangements have been made. In the late 1960s these often were reflected in board "policy statements" which recognized a teacher organization for purposes of "discussing" salaries and other matters, which committed the board to engage in discussions, which often included non-binding fact-finding procedures to be utilized in the event of teacher-board disagreement, and which always provided that the board retained its ultimate power of determination. Opinions issued by Democratic Attorneys General in the late 1960s legitimized these arrangements; the Attorneys General found that neither case law nor statutory law prohibited them.

In 1969 Hazelwood's teachers (who constituted the fifth-largest teaching corps in Missouri) became well-enough organized to induce the school board to adopt a policy statement which authorized bargaining-like activities. The policy clearly acknowledged the board's ultimate responsibility for determining policies. However it also recognized that

> [t]he establishment of procedures to provide an orderly method for the Board and the Association to discuss matters concerning the improvement and development of the education program, salary, welfare provision, and working conditions, and to reach mutually satisfactory understanding on those matters is in the best interests of public education (emphasis added).

The policy went on to recognize the Hazelwood Classroom Teachers' Association

(H.C.T.A.) as the teachers' representative, and outlined "discussion procedures" to be utilized by the board and H.C.T.A. teams. "Understandings" reached by the discussion teams were to be submitted to the H.C.T.A. membership for ratification and then submitted by the discussion teams to the board of education "for action"--an arrangement which preserved the board's ultimate authority. Disagreements were to be referred to three-person fact-finding teams which would render advisory opinions. A section on "discussion ethics" provided that there was to be "an atmosphere of mutual respect and courtesy." Further,

> [n]either of the parties will take any action or condone any action leading to the cessation or interruption of professional services to children of the district while discussions are in progress under this Board policy.

Thus the 1969 policy statement--signed by both H.C.T.A. and board representatives--embodied the rudiments of a bilateral collective bargaining process.

In 1970 the validity of the agreement was cast in doubt by a Republican Attorney General's Opinion (Opinion No. 57, June 1, 1970). The Opinion indicated that a school board had no authority to enter into agreements which obliged the board to engage in professional negotiations, even if the results of such negotiations were not binding upon the board. But then in 1974 the Attorney General's Opinion was superseded by a Missouri Supreme Court holding which found that board agreements to engage in discussions were not unlawful, so long as the agreement did not bind the board to accept the outcome of the discussions (Peters v. Board of Education, 506 SW2d. 429, Mo. Sup. Ct., 1974).

Was the Hazelwood Board of Education bound by its 1969 policy? On the strength of the 1970 Attorney General Opinion the Board evidently believed that the 1969 agreement with the H.C.T.A. was invalid. However the issue

was not directly confronted until 1974, when discussions over a 1974-75 salary schedule broke down and the teachers sought to invoke the fact-finding procedures outlined in the 1969 policy statement. The board refused. The teachers struck. Then, citing the Peters decision which had recently been issued, the teachers sought a court order requiring the board to follow the fact-finding procedure provided in the 1969 policy. The ensuing litigation produced a witty display of judicial reasoning which adds color to the generally drab and predictable annals of teacher strike litigation.

The teachers' petition came before Circuit Court Judge Orville Richardson--by all accounts a maverick and innovative judge. The H.C.T.A. had asked for a writ directing the board to abide by its 1969 policy statement. Rather than granting the writ immediately however, Richardson issued an order directing the board to show cause, five days later, why the writ should not be granted. However, he warned the teachers, their petition would be dismissed at the hearing if, in the meantime, they continued their strike. The teachers thereupon resumed work. At the show cause hearing Judge Richardson directed the parties to re-open negotiations. The fact-finding question was held in abeyance.

But still agreement proved impossible, and the H.C.T.A. renewed its quest for an order directing the board to comply with the fact-finding procedures set forth in the 1969 agreement. On September 3, 1974, Judge Richardson issued his opinion and order. He found that the 1969 agreement was binding and enforceable unless terminated by the use of the procedures set forth in the agreement itself. Further, he found that the present stalemate warranted utilization of the fact-finding procedures set forth in the policy. After construing the 1969 policy as a type of "contract," Richardson ruminated upon the teachers' request to compel specific performance of the "contract's" provisions concerning fact-finding. The judge acknowledged

that the board's prior reliance upon the Attorney General's Opinion was not unreasonable, but noted that the Peters case required the board to alter its position:

> [A]fter the Peters case was decided...there was no legal excuse for the Board to persist in its course of action. [But] it elected to adopt a negative attitude and parry the plaintiff's thrusts. Plaintiffs lunged here and there, wildly assaulting the circumambient air with an illegal strike and mandamus actions. That the Board has been successful to this date in dodging these passes is more of a credit to the nimbleness and dexterity of its counsel than to the tenability of its legal position....[M]eanwhile the community at large has been witnessing the running sword-play of the parties and their attorneys.

Even so, specific performance might not be compelled if the plaintiffs (H.C.T.A.) had unclean hands. The court was willing to assume the truth or near-truth of the board's charges against the teachers:

> The Board here utters its most bitter cries: it says that the teachers engaged in an illegal strike which lasted for seven days and disrupted the closing days of school in May, 1974. That is true. It says that the teachers were seeking to use that perfectly legal weapon of ordinary labor disputes, outlawed in the teachers' hands, to cudgel the Board into an unwilling acceptance of the teachers' demands. That is probably true. It is then said that H.C.T.A. is covertly a labor union and fomented the strike for collective bargaining purposes. There is no evidence on this record that this is true, but let us assume it for the moment. Defendants say that they have been beleagured and harassed by excessive demands and multiple suits, unjustly accused of bad faith, etc., etc. Partly true, perhaps. Let us assume that also as true.

The court then noted that the teachers were in a difficult position: unable to strike "like ordinary mortals"; "under-paid and hung up in an era of inflation"; subject to "insolence and even physical threat or violence at the hands of the pupils"; and frustrated by "two months of non-productive jawboning with the Board." The question, said Richardson,

> is whether such conduct on the plaintiffs' part is so inequitable, unfair, or unconscionable that this court should turn its back to both parties and remit them to the back alleys to slug it out until one of them is broken, defeated and publicly humiliated.

Such a result, the court decided, was not desirable.

> H.C.T.A. and the Board have publicly jousted long enough. It is now perfectly clear that the 1969 contract, including its fact-finding committee procedures, is valid, binding, and enforceable....[The teachers] have not only a right to speak but a right to be heard. This may not seem much, but their avid persistence reminds us that even a toothless tiger can gum you to death....(Opinion, State of Missouri ex rel. H.C.T.A., 1974).

Teachers viewed the court's decision as a major victory. But the victory was a short-lived one. The H.C.T.A.-appointed fact-finder and the board-appointed fact-finder were unable to agree upon a third fact-finder. Months of inaction followed Richardson's ruling. Finally the board, claiming that fact-finding was too time-consuming and costly, voted to revoke the fact-finding provisions of the 1969 agreement (St. Louis Post-Dispatch, April 11, 1975). Again the teachers went to court, this time asserting that a dispute on the fact-finding provisions had to be submitted to a fact-finding body. The Circuit Court again ruled in favor of the teachers (St. Louis Post-Dispatch, February 24, 1976).

* * * * *

In the ensuing years teacher-board relationships stumbled along, with the board resisting bilateral relationships and the teachers insisting upon them. Teachers suffered a number of adverse developments in the 1978-79 contract--a result which H.C.T.A. leaders attributed to insufficient militance on the part of H.C.T.A. members. The teachers resolved to take a firmer stand during negotiations over the 1979-80 contract. N.E.A. organizers provided organizing assistance.

Contract discussions began in October 1978. Neither side employed professional negotiators, and available reports indicate that things went badly from the start. There were strong-willed and abrasive personalities on both sides. In addition there were difficult substantive issues to be resolved. At the end of March discussions collapsed, with each side accusing

the other of bad faith. The teachers voted overwhelmingly to strike. During the next several days board efforts to end the strike served merely to polarize things further. No discussions were occurring among negotiators, and there seemed no way to end the strike.

The board sought an injunction, contending that the teachers had breached the terms of the 1969 agreement. The teachers responded with a countersuit charging the board with violating the state's Open Meetings statute. Moreover the teachers noted that they would contest any teacher dismissals resulting from the strike. Thus the stage was set for protracted litigation. However, at the time scheduled for the court hearing the attorneys for the two sides, the President of the H.C.T.A. and the Hazelwood Superintendent closeted themselves in the judge's chambers. For two hours they conferred, while courtroom spectators murmured and fidgeted. Finally the judge appeared and made a series of brief announcements. The teachers, said the judge, were not going to contest the board's request for a temporary injunction, and it would be issued forthwith. The hearing on the teachers' own request for injunctive relief was to be postponed. Then the judge said, "The court strongly suggests to both parties that they confer and resolve all matters between them."

The observed events seemed quite innocuous--and perhaps a major defeat for the H.C.T.A. However fragmentary comments about the proceedings in the judge's chambers, and reports of events during the next several hours, suggest that the chambers were the scene for some major procedural decisions which broke the impasse between the Hazelwood board and its teachers.

The board had entered court in a strong position; based on past experience with labor injunctions in Missouri teacher strikes the board could reasonably expect to receive the relief sought, although there was the possibility of some delay and some airing of issues and events which would

not normally be publicly viewed. On the other hand, the teachers had thrown up some strong legal responses: in addition to the Counterclaim filed along with their Answer to the board's request for injunctive relief, there was the suit alleging that the board had violated the Open Meetings Law, and there had been notice that the teachers intended to fully resist any dismissals of teachers. Further, there were signs that a back-to-work order might not be obeyed.

The court had entered the discussions with some agendas of its own, independent of the legal issues presented by the parties. For one thing, there was the court's own calendar; it would be disrupted by lengthy courtroom proceedings. In addition, the court was aware that the parties were not meeting to resolve their basic dispute. Courts are accustomed to fostering settlements which avert the need for hearings or trials. Finally, there were the actors themselves. Before the court were two officers of the court--the attorneys for the two sides. Also in chambers were two key actors (the Superintendent and the H.C T.A. President) who had vested interests in avoiding ultimate confrontation, and who were not representative of the negotiating teams which failed to avoid the problem in the first place. These new actors might be able to work out a settlement, particularly if urged by the court to do so. The teachers, whose principal objective from the outset had been a negotiated settlement, obviously would not resist the court's desire to engage in talks. The board, which was before the court seeking the court's assistance and which might return seeking more assistance, could hardly afford to ignore advice from the bench.

In the afternoon, following the court session, attorneys for the two sides met with the Superintendent and H.C.T.A. President, plus one board member and one member of the teachers' negotiating team. This was the first direct contact between the two sides since several days before the strike

began. New personnel were involved, and the court's "suggestion" served as a constant prod to work out a settlement. Results were described as "positive." Two days later a "framework for discussion" was agreed upon. (The language is an artifact of the Missouri legal milieu; the "framework" was in fact an agreement which was to be discussed by each side and then ratified.) Ratifications soon followed and school re-opened.

* * * * *

Thus in both 1974 and 1978 we find instances of judicial intervention aimed at restoring and preserving a bilateral process for reaching collective agreement on terms of employment. There is, in Missouri, no statutory authorization for such a process, and there is no mandate to the courts to foster such a process. (Indeed, in a 1976 decision the Missouri Supreme Court voided an agreement growing out of a strike by St. Louis teachers (St. Louis Teachers Association v. Board of Education, 544 S.W.2d. 573, Mo. Sup. Ct., 1976)). Yet in the Hazelwood district we found two clear instances of judicial support for a de facto bargaining process.

The Holland Rule

By 1978 teachers had a statutory right to strike in only six states: Alaska, Hawaii, Oregon, Pennsylvania, Wisconsin, and Vermont. Even in these states the right is limited; strikes are lawful (i.e., not subject to legal penalties) only if certain preconditions are met and only until such time as a court finds that they imperil the public health, safety, or welfare (or, in Vermont's case, until they "endanger a sound program of education"). At that point injunctive relief can be issued. Elsewhere we have reported on the manner in which the courts handle the task of establishing when a strike becomes harmful and enjoinable, and we have considered the way in which such proceedings are related to the underlying teacher-board dispute (Colton &

Graber, 1981; Colton & Graber, 1982).

Twenty-one states have adopted statutes prohibiting all teacher strikes. In most of these states the courts routinely enjoin strikes. Employers in states such as New York and Delaware can obtain injunctive relief merely by citing the pertinent statutes and then proving that the teachers are striking. Injunctions thus become virtually automatic. However in a few of these no-strike states the courts have introduced a de facto right to strike analagous to the one enjoyed in the six states cited above. The leading case in these situations arose in Michigan. There the 1965 Hutchinson Act--one of the first to authorize teacher-board bargaining--provides that "no person holding a position by appointment in...the public school service...shall strike." However in 1967 teachers in the community of Holland struck anyway. The Holland Board of Education thereupon petitioned the local circuit court for an injunction ordering the teachers to end their strike. In keeping with established legal precedents to the effect that teacher strikes were unlawful and therefore enjoinable in the absence of statutory authorization, the lower court enjoined the strike. The teachers appealed the ruling; the Court of Appeals sustained the lower court. However the Michigan Supreme Court reversed, holding that in Michigan it was "public policy" that injunctions should not be issued in labor disputes absent a showing of violence, irreparable injury, or breach of the peace. The court acknowledged the legislature's prohibition of teacher strikes. However, the court observed,

> courts are not required to grant (injunctive relief) in every case involving a strike by public employees. To attempt to compel legislatively, a court of equity in every instance of a public employee strike to enjoin it would be to destroy the independence of the judicial branch of government (School District of the City of Holland v. Holland Education Association, 157 N.W.2d 206, Mich. Sup. Ct., 1968).

Injunctive relief, the court observed, was available only under historic principles governing such relief. The mere showing that an illegal act had

occurred was insufficient to warrant issuance of an injunction.

> We here hold it is insufficient merely to show that a concert of prohibited action by public employees has taken place and that ipso facto such a showing justifies injunctive relief. We so hold because it is contrary to public policy in this State to issue injunctions in labor disputes absent a showing of violence, irreparable injury, or breach of the peace.... Simply put, the only showing made to the chancellor was that if an injunction did not issue, the district's schools would not open, staffed by teachers on the date scheduled for such opening. We hold such showing insufficient to have justified the exercise of the plenary power of equity by the force of injunction. ...
> [We] remand to the circuit court for further proceedings. We suggest that such proceedings inquire into whether, as charged by the [teachers], the plaintiff school district has refused to bargain in good faith, whether an injunction would issue at all, and if so, on what terms and for what period in light of the whole record to be adduced....(Holland, 1968:210).

Holland has had an impact in several states. In 1973 the Rhode Island Supreme Court, after affirming earlier holdings that teachers did not have the right to strike in the absence of legislative authorization, and that the courts can enjoin strikes, observed that it did not follow that "every time there is a concerted work stoppage by public employees, it shall be subject to an automatic restraining order" (School Committee of Westerly v. Westerly Teachers Association, 299 A.2d 441, 1973). The court acknowledged that the plaintiffs had filed a general affidavit averring that the schools would not be opening as scheduled, and that irreparable harm would ensue. But, said the court

> ...the mere failure of a public school system to begin its school year on the appointed day cannot be classified as a catastrophic event. We are...aware that there has been no public furor when schools are closed because of inclement weather, or on the day a presidential candidate comes to town, or when the basketball team wins the championship. The law requires that the schools be in session for 180 days a year...There is a flexibility in the calendaring of the school year that not only permits the makeup of days which might have been missed for one reason or another but may also negate the necessity of the immediate injunction which could conceivably subject some individuals to the court's plenary power of contempt (Westerly, 1973:445).

The court found the evidence insufficient to warrant a temporary restraining order under the rule requiring a finding of irreparable harm, and the temporary restraining order was quashed. Appleton (1980) surmises that the court may have been less interested in the matter of irreparable harm than in the effect an injunction might have on the bargaining process.

In 1974 the New Hampshire Supreme Court took up the Holland banner in Timberlane Regional School District v. Timberlane Regional Education Association (317 A.2d 555). Reviewing (and upholding) a lower court's refusal to issue an injunction against striking teachers, the court noted that

> The injunction is an extraordinary remedy which is only granted under circumstances where a plaintiff has no adequate remedy at law and is likely to suffer irreparable harm unless the conduct of the defendant is enjoined. The availability of injunctive relief is a matter within the sound discretion of the court, exercised on a consideration of all the circumstances of each case and controlled by established principles of equity (Timberlane, 1974:558).

Citing Holland and Westerly, the court opined

> Accordingly, it is our view that in deciding to withhold an injunction the trial court may properly consider among other factors whether recognized methods of settlement have failed, whether negotiations have been conducted in good faith, and whether the public health, safety and welfare will be substantially harmed if the strike is allowed to continue (Timberlane, 1974:559).

In 1977 the Idaho Supreme Court embraced the Holland principle in School District No. 351 Oneida City v. Oneida Educational Association (567 P.2d 830). The court dissolved an injunction which the trial court had issued without a hearing. "Mere illegality of an act," said the court, "does not require the automatic issuance of an injunction." Citing Holland, Westerly, and Timberlane, the Idaho Supreme Court noted that the lower court had refused to hear evidence relating to traditional equity defenses. The opinion indicated that the court was particularly interested in defenses concerning the plaintiff's alleged failure to adhere to mandated bargaining procedures.

Holland and its progeny conveyed an important message to prospective school board plaintiffs and to the lower courts: injunctive relief would no longer be available simply upon proof of the existence of an illegal strike, and hearings about the issuance of injunctive relief could range over the full array of equitable standards--e.g., availability of alternate forms of relief, clean hands, irreparable harm. Even if the courts found for the plaintiffs on all counts, the proceedings themselves would introduce a delay of hours or days between the time injunctive relief was sought and the time it could be issued. For this interval the teachers had a de facto right to strike. And the courts, during the hearing process, had ample opportunity for the exercise of initiatives aimed at promoting settlement of the teacher-board dispute.

In 1978 we studied a strike in one of the states where the Holland rule prevails. Our sources reported that different courts within the same state were applying the rule in different ways. Some strikes were being enjoined promptly and on an ex parte basis even though the Holland rule precludes such injunctions. Other courts however, including the one we studied, applied the full panoply of Holland standards. One effect was apparent in the school board's decision to delay seeking injunctive relief, evidently on the assumption that the local court would not grant relief until some harm, such as a threat to the 180-day calendar, could be shown. Put differently, the board anticipated that the local court would not grant prompt relief and therefore allowed the strike to continue as a bilateral dispute for several days. During this period efforts to settle the strike failed.

As soon as the case reached the court the teachers attempted to persuade the judge that settlement could be achieved if only the board would engage in negotiations. A teacher leader reported to us in these terms:

> The hearing was set for 9:30. The judge called us into chambers ....And I told the judge...that since he was acting as a mediator I would share with him as a mediator exactly where we were willing to settle, which was significantly lower than our formal position was. And I laid out for him what our perception was of the ability of the district to come forth with what we were asking for. And he bought our figures and believed that we were being reasonable and that we had come into the court-room with a willingness to bargain. Well, the superintendent, two weeks into the strike, was still at "this is my last offer." So the judge said, "Why don't we send the two attorneys out to act as go-betweens and see if we can get anything going." The judge was leaving that night [for] a judge's conference, and so he really probably did not want to delay his weekend by locking us into chambers. So he was going to try to get something going that morning. We worked between the two attorneys until about 12:30....

Immediately following the collapse of the settlement efforts a hearing was held. The court decided to enjoin the strike, but also to order bargaining. The judge's musings from the bench reflect his sentiments and reveal the motives for his continuing efforts to force a settlement:

> [There] doesn't appear to be any happy medium whereby you can resolve honest and legitimate differences. There just doesn't appear to be. You have had the benefit of [the state mediation officer] and that hasn't helped. Negotiations have broken off and I just don't know personally just how to get you going on a bonafide effort. It seems simple to say "go do it." But that's not going to accomplish too much unless the parties really want to get it done and feel that they have to. But I do know this--that the purpose of the [teacher bargaining statute] was to preserve to the public the benefits of those services for which they pay, and to me that is the overriding consideration in this whole picture....I say this because I am going to issue that injunction....I don't have the power to force these parties to negotiate, but I am going to place in this order also that they commence negotiating and I am going to have a running record on what is going on with the hope that somewhere along the line, just out of the goodness of the hearts of the people involved, knowing the responsibility that they have on their shoulders, which is tremendous, negotiate. The negotiating group for the union and the negotiating group for the School Board have a tremendous responsibility. It isn't a question of just going home with some marbles. What they are doing is affecting the lives of thousands and thousands of people. It has to come to an end and it has to come to a head somehow. If I had the power to...set a contract I'd stay here all night and I'd set the contract, but I can't do that. I can just go back and say to you, go back in good faith and attempt to revolve this problem....(transcript).

The order then was issued and the judge went off to his conference. But settlement efforts failed, and teachers defied the injunction. During the next several days a variety of circumstances delayed the initiation of contempt proceedings, so that the court effectively abandoned the dispute to other parties: the board (which commenced to dismiss teachers), the teachers (who maintained their strike in the face of both the injunction and the dismissals), and the public. Nothing worked. However when contempt proceedings finally began, they shortly were recessed, allegedly because of signs of movement by the parties. The court appointed a person to serve as "master of the court" in negotiations. Settlement soon was reached and legal proceedings were terminated.

An interested observer of the scene (a teacher leader), offered this explanation for the court's evident lack of enthusiasm in pushing contempt proceedings:

> We had a lot of politics going on that weekend. The head of [a major labor union] talked to Judge B who was running for court of appeals and had formerly been a bench partner of Judge A (who was hearing the case--ed.). B, through the influence of the union, went to see Judge A that weekend to advise him not to come down with contempts [sic]. We had a judge who was running for probate judge, C. And in both cases, we were of course endorsing them after the strike and really did a lot for them. And they both won. But C happened to be a good friend of one of the teachers in one of the small districts on the east side of town. And he was best friends with A. And he went to see A on our behalf with the same advice (Interview).

We do not know whether the observer's account is accurate, or whether it had any influence on the course of events. But the story is entirely consistent with a piece of old folk wisdom: judges read the election returns.

* * * * *

From the foregoing it appears that the Holland case has had a number of structural effects. It delayed the onset of injunction proceedings, thereby creating, at least for a time, a de facto right to strike. Moreover, by

ruling out automatic injunctions and requiring judges to consider all the equitable aspects of the situation, Holland virtually invited the exercise of broad judicial discretion, not merely with respect to the issuance of injunctions but also with respect to resolution of the underlying teacher-board dispute. In exercising that discretion courts may respond to a variety of considerations including, perhaps, the political milieu.

California: The San Diego Decision

In California the legislature has remained silent on the matter of teacher strikes, despite repeated legislation affecting other aspects of teacher-board collective relationships. Teachers interpret the legislature's silence on the strike issue as implying a right to strike but school boards argue that in the absence of explicit statutory authorization strikes are illegal. Until 1979 school boards evidently had the better legal argument; in a series of cases the courts held that in the absence of enabling legislation teacher strikes were unlawful and therefore enjoinable. Holland standards did not apply. School boards regularly sought and obtained injunctive relief from teacher strikes, often on an ex parte basis. However in its 1979 San Diego decision a narrowly-divided California Supreme Court changed the rules. As it had done in the past the Court ducked the question of the legality of teacher strikes. But the Court ruled that a school board seeking injunctive relief had to ask the state Public Employment Relations Board (PERB) to seek the relief. Boards could not apply directly to the courts. Preliminary evidence indicates that the ruling has altered the structural context of teacher-board bargaining disputes in California.

As often happens in such matters, the San Diego decision was an unintended and unexpected outcome of a routine teacher strike. Late in the 1976-77 school year San Diego teachers struck in an effort to force a

conclusion to extended negotiations on their 1977-78 contract. The school board promptly sought and obtained an injunction directing teachers to halt their strike. The injunction was defied by the teachers, whose Association and President later were held in contempt of court. The Association was fined and the President was both fined and sentenced to jail. The teachers appealed, claiming that the injunction was void under the terms of the state's recently-adopted Rodda Act.

The Rodda Act, successor to the earlier Brown Act and Winton Act dealing with collective relationships, moved California a long way toward adoption of a full-fledged bargaining law. One portion of the Act established a state-level Public Employment Relations Board (PERB) and charged it with the task of hearing complaints of unfair labor practices and of taking action upon such complaints. However the legislation did not define strikes as unfair labor practices, and in 1978 the PERB had neither substantive nor procedural rules for dealing with strikes, per se. There was a presumption (not shared by teachers' attorneys) that strikes were unlawful under the Rodda Act, and that school boards could apply directly to the courts for injunctive relief if faced by a strike.

In their effort to vacate the injunction under which San Diego teachers had been convicted, teachers' attorneys claimed that the Rodda Act conferred upon the PERB responsibility for ascertaining whether strikes were unfair labor practices. Upon completion of its investigation, the teachers suggested, PERB could decide upon an appropriate course of action, which could include injunctive relief but which might include alternate relief more appropriate to the support of settlement efforts. In any event, the teachers suggested, PERB had exclusive original jurisdiction over teacher strikes; consequently courts could not hear injunction requests until PERB had completed its investigations and determined that such relief was

appropriate. In a supporting brief, two members of the three-person PERB supported the teachers' position. But the third member, in a separate brief and with a supporting affidavit from Senator Rodda himself, argued that the legislature had not intended to steer strikes to PERB.

The Supreme Court accepted the teachers' position, declaring that PERB had exclusive initial jurisdiction over teacher strikes. It was up to the PERB to find whether a particular strike was an unfair labor practice and then, in its judgment, to decide whether to seek injunctive relief. In support of its opinion the court referred to the National Labor Relations Act and the National Labor Relations Board, which were deemed to be analagous to California's Educational Employees Relations Act and PERB. Since PERB had been created to consider charges of bad faith bargaining, PERB was the proper body to consider charges that a strike was evidence of bad faith. Moreover, the court declared, bringing such matters before PERB would "help bring expertise and uniformity to the delicate task of stabilizing labor relations."

Structural consequences of the San Diego decision began to appear within a few weeks. One effect was visible in PERB itself, which had to adopt substantive and procedural rules for dealing with teacher strikes. There was some initial skirmishing within PERB over a proposed policy that would have declared some strikes as per se violations of the Rodda Act. This proposed policy failed to win adoption, evidently on the not-unreasonable basis that San Diego authorized the PERB to decide whether practices were fair or unfair, but not whether they were legal or illegal. Procedural rules were adopted instead, providing for prompt notice of strikes, prompt hearings, and prompt decisions by the PERB (Filliman, 1979).

These procedures had two important structural implications for teacher-board relations. First, San Diego created a de facto right to strike, at

least in the sense that instant injunctive relief no longer was available directly to school employers. Rather than going to a local courthouse to obtain ex parte injunctions, school boards now had to go through a hearing process before PERB. Even if PERB acted expeditiously, several hours would be required for PERB to conduct a hearing and apply for injunctive relief. For that period, at least, boards were without legal recourse. Second, and probably of greater significance, any effort by a local district to obtain injunctive relief had to be processed through a body (PERB) whose orientation toward such matters differed from that of typical local courts.

Fragmentary data about initial post-San Diego strikes suggest how the court's decision can affect teacher-board disputes. One school district (Chico), perhaps trying to avoid the time-lag that would occur if it waited until the onset of a strike to ask PERB to seek injunctive relief, sought to enjoin the threat of a work stoppage; PERB denied the district's request (Filliman, p. 5). Settlement was reached before the threatened strike began.

In Oroville a PERB hearing on the school board's request for injunctive relief was held during the afternoon of the first day of the strike; according to a PERB official, at the hearing "PERB officials were able to get the parties back together and oversaw the negotiation of a back-to-work agreement." Success here may have been due to the circumstance that the strike reportedly was a result of negotiating errors rather than irreconcilable substantive differences; the presence of a PERB official and the forum provided by the hearing process evidently sufficed to re-establish negotiations. Both parties are said to have praised PERB for its role in promoting a settlement (Filliman, p. 63).

A strike in Val Verde produced less enthusiastic reports of PERB's effects. Teachers struck unexpectedly, and at a hastily convened proceeding,

PERB decided to act favorably on the district's request for injunctive relief, on the ground that the teachers had struck without first engaging in mandatory impasse procedures. The teachers then complained that the district had engaged in unfair labor practices. PERB held another hearing, this one leading to a request to the court to enjoin unfair practices by the school district. By this point the court was heavily engaged in the dispute, and it appears that it was the court rather than PERB that played the most significant role in engineering a settlement of the dispute.

In another strike (Las Virgenes) a PERB hearing led to PERB's first published order concerning post-San Diego proceedings. PERB decided to seek limited injunctive relief against the teachers on the ground that the strike had preceded the expiration of a mandated delay following publication of a fact-finding report. However the PERB also sought and obtained an order affecting the scope of bargainable issues; reports indicate that this order confused and offended both sides of the dispute. Later, when the initial injunction expired, the board declined to ask PERB for further injunctive relief.

One of the most difficult substantive problems with the San Diego case finally surfaced in the context of a strike in Modesto. In San Diego the Supreme Court, skirting the question of legality of teacher strikes, simply required that school boards seeking injunctive relief must do so through PERB, which would establish whether an unfair labor practice had occurred. However the court failed to delineate legal posture of a situation in which PERB failed to find an unfair labor practice. Would such a strike then be illegal and hence enjoinable? If PERB completed its proceedings and found no unfair labor practice, did PERB still have jurisdiction, or did petitioners then have a right to go to court directly? In the Modesto strike in early 1980, PERB addressed these matters and it split 2-1, as it had in the legal

developments preceding San Diego. The PERB majority, finding that impasse procedures had been followed, claimed that the strike was not necessarily illegal, and that PERB retained jurisdiction over the case--effectively blocking the school board from seeking direct court relief following the PERB hearing. A dissenting PERB member pointed out that "the majority decision...effectively [permits] the strike as an acceptable political and economic weapon in school district labor disputes...Neither the legislature nor the courts have sanctioned it. In this case, the majority attempt to accomplish this administratively." Thus in Modesto PERB appears to have further broadened a de facto right to strike for California teachers (Government Employee Relations Report, 863, May 26, 1980:23). We do not know whether subsequent events have sustained the Modesto precedent.

From these scattered reports of initial post-San Diego events it is possible to infer some likely structural effects on other teacher-board disputes. First, it seems clear that ex parte injunctions and instant injunctive relief from teacher strikes no longer are possible in California. Second, the case appears to have strengthened PERB's hand in dealing with unfair labor practices, and this fact may help inhibit the incidence of such practices--particularly those which violate mandated impasse procedures. Put differently, there may be a greater incentive to fully utilize bilateral procedures. Third, the intrusion of PERB into a strike situation may help to broaden the range of techniques and skills available to resolve such situations, for PERB staff members, to an extent greater than that of judges, are trained to deal with labor-management disputes. (On the other hand, initial PERB efforts in California were not terribly reassuring on this point.) While courts often have played a third-party role in such disputes (Colton & Graber, 1982), it now appears that in California the burden will fall more heavily on PERB than on the courts. The burden, in

turn, will affect PERB. One effect already is apparent: an internal reorganization of PERB is occurring in order to provide for administrative separation of staff members' roles as neutrals (e.g., hearing officers) and as advocates (e.g., filing petitions in court on behalf of school districts and/or teachers). Such internal differentiation ultimately may have its own effects on the structure of teacher-board bargaining relationships in California (Government Employee Relations Report, 939, November 23, 1981:15).

Discussion

Stepping back from the details of the events just described it appears to us that the courts clearly are instrumental in structuring collective bargaining relationships. In the Missouri situation, a court declared that a procedural agreement, voluntarily and mutually accepted by two parties, could not be unilaterally abridged by the school board; a contract providing for a bilateral process was as enforceable as a statute providing for a bilateral process. Moreover the court went beyond the task of declaratory judgment; in the context of a teacher strike a judge successfully interceded in efforts to break a procedural deadlock. In other states the same outcome might have been achieved through statutory bodies such as PERBs; however in Missouri there are no statutory provisions governing teacher-board collective bargaining disputes. Missouri courts serve both as surrogate legislatures and as pseudo-PERBs.

In a case governed by the Holland precedent we saw that Holland influenced school board access to injunctive relief. Later, courtroom proceedings addressed not merely the issue of a strike's legality; other equitable matters, including the nature of harm and the clean hands argument, served to delay proceedings and broaden the scope of court involvement.

The California Supreme Court's San Diego case altered the structural

context of teacher strikes, inserting a specialized labor-management relations body (PERB) between the disputing parties and the courts. The ruling forced PERB to adopt procedural and substantive rules to be followed; those rules in turn put a premium on the question of impasse procedures, diverting attention from the more familiar question of the legality or illegality of teacher strikes.

We do not want to convey the impression that we think the courts are omnipotent. Indeed, judicially-initiated settlement efforts occasionally proved impotent in the face of entrenched positions. Many courts consciously seek to limit their involvement in teacher-board disputes. Moreover there are severe limitations upon courts which overreach themselves. Appeals procedures discipline the lower courts. For example, the Pennsylvania Supreme Court vacated the opinion of a lower court judge who, on his own motion, challenged the constitutionality of Pennsylvania's public employee bargaining law. In Missouri a lower court judge ordered a school board to reinstate striking teachers whom it had dismissed; on appeal the order was vacated. Thus the prospect of appeal and reversal, coupled with the burden of precedent, keep judicial discretion within bounds.

Within these bounds, as we have suggested, there remains substantial room for the courts to structure labor-management relations in school districts. We repeatedly encountered situations in which the courts attempted to repair or give impetus to a bilateral bargaining process. Ironically, these efforts always arose in the context of efforts by one party or another to "get the law on their side." What they got, instead, was judicial attention to a dispute resolution process. Time after time the courts provided structure to that process.

In a sense, such efforts are hardly surprising. Most of the disputes which enter the legal system are resolved short of an official and formal

judicial determination of the rights and obligations of the parties. Pre-trial conferences, bargaining processes, and out-of-court settlements are the most common outcome of litigation initiatives. So it is with collective bargaining disputes, where the courts often choose to function in their usual fashion of expediting settlements of the underlying disputes.

Under the circumstances it is appropriate to ask whether the courts appear to be applying any particular theory or philosophy of public sector labor-management relations. We suggest that they do not. Rather they work from paradigms already familiar to them. To Judge Richardson in Missouri, the issue in Hazelwood was whether the teacher-board agreement to hold discussions was binding. Was there, in different terms, a contract? He found that there was, and he insisted upon adhering to it even if, as he put it, the contract put one of the parties in the posture of a "toothless tiger." In Holland the issue of injunctive relief was not construed in light of the special circumstances of public sector bargaining; rather it was located in the context of traditional judicial prerogatives vis-a-vis the legislature, and traditional procedures for the award of injunctive relief--procedures which demanded the exercise of broad discretionary powers by the court. (By way of contrast, courts under New York's Taylor Law grant injunctive relief as a matter of course.) In San Diego, it seems to us significant that the Supreme Court majority sought guidance from the National Labor Relations Act and the National Labor Relations Board--both of which are designed to facilitate bargaining in the private sector.

We are not suggesting that the courts ought to have some rationale for action based on the peculiar circumstances of public sector and teacher-board bargaining. We simply are observing that the courts do not have such rationales. Thus, to the extent that courts structure the process, they do so in terms of their own constructions of reality, which may well be at odds

with those of other bodies and individuals. If collective bargaining structures display internal inconsistencies or anomalies, it may be because those structures arise from a variety of sources. Among them are the courts.

To us at least, it seems clear that we need to know much more about such matters. In a fundamental sense, our inquiries lead to questions about the general role of law in society. It is significant, we think, that in states such as Illinois, specialists representing both teachers and school boards appear to believe that the bargaining process is better served by case law than by what they fear the legislature may adopt--a "bad" statute. A "bad" statute, in their judgment, appears to be one that would tilt the bargaining process too much in the direction of school boards or teachers. These individuals seem to feel that the legislature, if it acts at all, is more apt to adopt a statute biased in favor of one side or the other than a statute which is "neutral" vis-a-vis the parties in the bargaining relationships. This lack of confidence in the legislative process is disconcerting. It would be helpful, we think, if we had studies which systematically compared the efficacy of the bargaining process in places where it occurs with statutory sanction and places where it occurs with judicial sanction. What is the nature and significance of the differences, if any?

Inquiry also would be desirable, we suggest, in order to more fully comprehend the predilections and strategies which judges bring to disputes between labor and management. Are the courts biased one way or the other? Does the adversarial process sufficiently neutralize judicial bias? Is it commonplace to find, as we did in one Pennsylvania case, judges so upset at the price of bargaining that they seek to undermine the statutory basis for such bargaining? (We refer to Judge Kiester in Butler, who in 1978 took it upon himself to declare Pennsylvania's bargaining statute unconstitutional.) Or is it commonplace to find, as we did in one Illinois community, school

board attorneys who believe that certain judges are so pro-labor that efforts to seek injunctive relief in their courts are doomed from the outset?

Finally, we note again that the courts are playing significant roles in structuring teacher-board collective relationships. Should that role be encouraged, or should it be assigned to bodies such as PERBs? Further clarification of the efficacy of judicial dispute resolution capabilities might provide a better base of information on which to base answers to such inquiries.

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